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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff, - v.- UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	**ECF CASE** 05 Civ. 5468 (JSR)

DEFENDANT'S COUNTER-STATEMENT
PURSUANT TO LOCAL CIVIL RULE 56.1

Defendant the United States Department of Defense ("DOD") objects to plaintiff the Associated Press's ("AP's") Rule 56.1 Statement because it is not short and concise, as required by Local Civil Rule 56.1(a); because it is argumentative; because it refers to alleged facts that are not material; and because numerous factual assertions are not followed by citations to evidence which would be admissible under Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d). DOD further objects to AP's Rule 56.1 Statement because it is neither required nor appropriate in a case brought pursuant to the Freedom of Information Act. See Ferguson v. FBI, No. 89 Civ. 5071, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (citing

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Carney v. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994)), aff'd, 83 F.3d 41 (2d Cir. 1996).

Subject to and without waiving these objections, DOD responds as follows.

1. The Associated Press is a not-for-profit, news sharing co-operative that gathers and disseminates the news to newspapers, magazines, broadcasters, cable television operators and Internet content providers throughout the United States and around the world. *See* Compl. ¶ 6.

Response to Paragraph 1

This paragraph is disputed as unsupported by evidence which would be admissible under Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d).

2. Following the attacks of September 11, 2001, the United States government captured and took custody of many "enemy combatants" during military operations in Afghanistan against al-Qaeda and the Taliban regime. The government also detained individuals in other countries who it considers also to be enemy combatants due to perceived connections to al-Qaeda and other terrorist groups.

Response to Paragraph 2

This paragraph is disputed as unsupported by evidence which would be admissible under Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d).

3. Since January 2002, hundreds of these detainees have been housed at the Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). About 750 detainees have been held at one time or another at Guantanamo. *See* Department of Defense ("DOD") News Release No. 12306, entitled "Detainee Release Announced" (Declaration of Adam J. Rappaport ("Rappaport Dec.") Ex. C).

Response to Paragraph 3

This paragraph is not disputed.

4. At least 267 detainees held at Guantanamo have been transferred out, and some 490 detainees remain confined there today. *See id.*

Response to Paragraph 4

This paragraph is not disputed.

5. DOD has contended that the detainees being held at Guantanamo are "enemy

combatants" of the United States and may be held indefinitely until the war on terrorism ends.

Response to Paragraph 5

This paragraph is disputed as unsupported by evidence which would be admissible under Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d).

6. Several former detainees have publicly alleged that they were abused at Guantanamo, *see, e.g.*, Glenn Frankel, *Three Allege Guantanamo Abuse*, Wash. Post, Aug. 5, 2004, at A12, and others have conveyed allegations of abuse through their attorneys, *see* Josh White, *Guantanamo Desperation Seen in Suicide Attempts*, Wash. Post, Nov. 1, 2005, at A1.

Response to Paragraph 6

This paragraph is disputed as unsupported by evidence which would be admissible under Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d).

7. Human rights organizations have charged that some of the handling and interrogation of detainees was "tantamount to torture." *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. Times, Nov. 30, 2004, at A1. The United Nations has reported that the treatment of detainees in some cases "amounted to torture." *See* Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantanamo*, N.Y. Times, Feb. 17, 2006, at A6.

Response to Paragraph 7

This paragraph is disputed as unsupported by evidence which would be admissible under Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d).

8. Military officers and FBI agents who have worked at Guantanamo have questioned the treatment of detainees and the conditions under which they are being held. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474 (D.D.C. 2005) (recounting FBI agent's allegations of detainee mistreatment); Neal A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. Times, May 1, 2005, at A35.

Response to Paragraph 8

This paragraph is disputed as unsupported by evidence which would be admissible under Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d).

9. Joint Task Force-Guantanamo ("JTF-Guantanamo") is the military unit responsible for overseeing the detainees. JTF-Guantanamo consists of several thousand U.S. service members, including the DOD personnel who serve as guards. *See* Declaration of Karen Hecker ("Hecker Dec.") ¶ 6.

Response to Paragraph 9

This paragraph is not disputed.

10. When there is an allegation of mistreatment of a detainee, the JTF-Guantanamo commander normally orders an officer to conduct an investigation. *See id.* ¶ 17a.

Response to Paragraph 10

The paragraph is disputed as an inaccurate recitation of the contents of Paragraph 17(a) of the Declaration of Karen L. Hecker dated February 22, 2006 ("Hecker Decl."). See Hecker Decl. ¶ 17(a) ("In the case of the [disciplinary] records described in paragraph 8 above, investigations were initiated to determine whether the military personnel had engaged in any criminal misconduct and, if so, how those personnel should be disciplined for that misconduct. Investigating officers were appointed by the Commander of JTF-Guantanamo to conduct the investigations.").

11. At the completion of the investigation, the officer reviews the documents generated and determines whether to hold the subject criminally responsible. *See id.*

Response to Paragraph 11

The paragraph is disputed as inaccurate. See Hecker Decl. ¶ 17(a) ("Upon completion of the investigation, the commanding officer reviewed the investigative documents and determined whether to hold the subject criminally responsible for any substantiated misconduct that violates the UCMJ.").

12. JTF-Guantanamo maintains files of these disciplinary actions. *See id.* ¶ 7.

Response to Paragraph 12

This paragraph is not disputed.

13. These files normally consist of a record of the disciplinary action and a report of the investigation in the alleged conduct. *See id.* ¶ 8.

Response to Paragraph 13

This paragraph is not disputed.

14. JTF-Guantanamo also maintains an automated database to "help it keep track of nearly every aspect of a detainee's daily life." *See* American Forces Information Service News Article entitled "Automated System Helps Guantanamo Guards Track Detainees" (Rappaport Dec. Ex. D).

Response to Paragraph 14

This paragraph is not disputed.

15. The Detainee Information Management System ("DIMS") contains information about individual detainees, such as medical and behavioral notes, and detainee requests and refusals, as well as information about cells and cellblocks. *See id.* A "journal" section of DIMS keeps track of significant activities and noteworthy events in each cellblock. *See id.*

Response to Paragraph 15

This paragraph is not disputed.

16. When an incident of physically or verbally abusive conduct between detainees occurs, the DOD personnel who observe the incident record their observations and the results of any investigation into DIMS as a "Detainee Report." *See* Hecker Dec. ¶ 19a.

Response to Paragraph 16

This paragraph is not disputed.

17. When an allegation of abuse was raised by a detainee during a CSRT, JTF-Guantanamo's legal staff generated memoranda and other records of investigations into these allegations.

Response to Paragraph 17

This paragraph is disputed as unsupported by evidence which would be admissible under

Rule 56(c) of the Federal Rules of Civil Procedure, as required by Local Civil Rule 56.1(d).

18. In June 2004, DOD created an Administrative Review Board ("ARB") to conduct an annual review of the status of each detainee designated an enemy combatant. *See* May 11, 2004 Order of Deputy Secretary of Defense Paul Wolfowitz ("Wolfowitz Order"); Hecker Dec. Ex. 1.

Response to Paragraph 18

This paragraph is disputed as inaccurate and incomplete. See Hecker Decl., Exh. 1 (May 11, 2004 Order establishing ARB process); Hecker Decl., Exh. 2 (September 11, 2004 Memorandum establishing ARB procedures); Hecker Decl. ¶ 3a ("The ARB process annually assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention.").

19. A Designated Civilian Officer ("DCO") is designated by the Secretary of Defense to operate and oversee the administrative review process. *See* Wolfowitz Order ¶ 2B; Hecker Dec. ¶ 3D.

Response to Paragraph 19

This paragraph is disputed as inaccurate. See Hecker Decl. ¶ 3b (DCO appointed by Deputy Secretary of Defense).

20. The ARB is charged with determining on an annual basis whether each detainee should continue to be held or instead should be released or transferred to the custody of another country, based primarily on whether the detainee is considered a threat to the United States. *See* Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba ("Implementation Mem.") ¶ 1 (Hecker Dec. Ex. 2).

Response to Paragraph 20

This paragraph is disputed as inaccurate and incomplete. See Hecker Decl., Exh. 2 ¶ 1c ("In accordance with policy guidance set by the Secretary of Defense, the Administrative Review Procedures will encompass an administrative proceeding for consideration of all relevant and reasonably available information to determine whether the enemy combatant represents a continuing threat to the U.S. or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters (e.g., Taliban), and whether there are other factors that could form the basis for continued detention (e.g., the enemy combatant's intelligence value and any law enforcement interest in the detainee).").

21. DOD, through a Designated Military Officer, presents evidence concerning the detainee to a session of the ARB. *See* Implementation Mem., Encl. (4) ¶¶ 1g, 2e.

Response to Paragraph 21

This paragraph is disputed as incomplete. See Hecker Decl., Exh. 2, Encl. 4 ¶ 1g ("The DMO gathers and reviews all reasonably available threat and other information relevant to the enemy combatant, including any information provided by the home State, the enemy combatant's family, and other U.S. agencies. The DMO provides this case information to the ARB and the AMO."); id. ¶ 2e ("Once the unclassified session with the enemy combatant is adjourned, the ARB PO reconvenes with only the ARB Members, the DMO, and the AMO, and the board reporter or paralegal present to receive and assess classified information.").

22. Detainees are provided with an Assisting Military Officer ("AMO") and given an opportunity to appear and make an oral or written statement to their ARB. *See id.* ¶ 2c.

Response to Paragraph 22

This paragraph is disputed as incomplete. See Hecker Decl. ¶ 3d-e; id. Exh. 2, Encl. 3 ¶ 3a & Encl. 4 ¶ 1k & Encl. 10 ¶¶ 1c, 2.

23. No witnesses are allowed to testify before an ARB, but detainees may provide documents directly to the ARB or via their AMO. *See id.* ¶ 2d.

Response to Paragraph 23

This paragraph is disputed as incomplete. See Hecker Decl. ¶ 3d-e; id. Exh. 2, Encl. 3

¶ 3a & Encl. 4 ¶ 1k & Encl. 10 ¶¶ 1c, 2.

24. After a session where facts concerning a detainee are presented, the ARB meets privately and votes to recommend whether the detainee should be released, transferred, or further detained. *See id.* ¶¶ 2g; 3a-b.

Response to Paragraph 24

This paragraph is not disputed, except that the facts presented at this session are classified. See Hecker Decl., Exh. 2, Encl. 4 ¶ 2e.

25. The ARB prepares a record of the entire proceeding. *See id.* ¶ 3c.

Response to Paragraph 25

This paragraph is disputed as inaccurate. See Hecker Decl., Exh. 2, Encl. 4 ¶ 3c ("The ARB or the DMO under the ARB's direction prepares a record of the proceeding.").

26. The ARB submits the assessment, the record of proceedings, and its recommendations (collectively the "ARB Record") to the DCO. *Id.* ¶ 3d.

Response to Paragraph 26

This paragraph is not disputed.

27. The ARB Record is submitted to the DCO through the Director of the Office of Administrative Review of the Detention of Enemy Combatants, who attaches to the ARB Record an "Action Memo" that summarizes the proceedings. *See* Rappaport Dec. Ex. F.

Response to Paragraph 27

This paragraph is not disputed.

28. Based on the ARB Record and Action memo, "[t]he DCO decides whether to release, transfer with conditions, or continue to detain the enemy combatant." Implementation Mem., Encl. (4) ¶ 5c.

Response to Paragraph 28

This paragraph is disputed as incomplete. See Hecker Decl. ¶¶ 3, 5, 16 & Exhs. 4-5.

29. From December 14, 2004 to December 23, 2005, DOD completed this ARB review process for 463 detainees. *See* DOD News Release No. 124-06, entitled "Guantanamo Bay Detainee Administrative Review Board Decisions Completed" (Rappaport Dec. Ex. G).

Response to Paragraph 29

This paragraph is disputed as inaccurate and incomplete. See Hecker Decl. ¶¶ 3, 5, 16 & n.10 & Exhs. 4-5; Supplemental Declaration of Karen L. Hecker dated March 13, 2006 ("Supp. Hecker Decl.") ¶ 10.

30. Of the 463 reviews completed in 2005, the DCO decided to release 14 detainees, transfer 120, and continue to detain 329. *See id.* An additional 18 ARB [sic] have been completed as of February 20, 2006. *See* "Administrative Review Board Summary" (Rappaport Dec. Ex. H).

Response to Paragraph 30

This paragraph is disputed as inaccurate and incomplete. See Hecker Decl. ¶¶ 3, 5, 16 & n.10 & Exhs. 4-5; Supp. Hecker Decl. ¶ 10.

31. Once the DCO has made his decision, the DCO is required to coordinate within DOD and with the Department of State and Department of Homeland Security (if necessary) "to implement any enemy combatant release or transfer according to established Deputy Secretary of Defense Policy." Implementation Mem., Encl. (4) ¶ 5d.

Response to Paragraph 31

This paragraph is disputed as incomplete. See Hecker Decl. ¶¶ 3, 5, 16 & Exhs. 4-5.

32. As of February 22, 2006, 20 Guantanamo detainees had been physically released or transferred through the ARB process. *See* Hecker Dec. ¶ 3o.

Response to Paragraph 32

This paragraph is not disputed.

33. The DCO has decided to release or transfer 130 more detainees, pending foreign government assurances. *See id.*

Response to Paragraph 33

This paragraph is disputed as inaccurate and incomplete. See Hecker Decl. ¶¶ 3, 5, 16 & n.10 & Exhs. 4-5; Supp. Hecker Decl. ¶ 10.

34. On November 16, 2004, AP submitted a FOIA request to DOD for a number of records. In pertinent part, AP asked to obtain copies of all records of: (1) disciplinary actions initiated since January 2002 as the result of an allegation of mistreatment at Guantanamo; and (2) allegations of detainee-against-detainee abuse. *See* Rappaport Dec. Ex. A.

Response to Paragraph 34

This paragraph is not disputed.

35. On January 18, 2005, AP submitted a FOIA request to DOD. In pertinent part, the January 18 request sought: (1) transcripts of testimony given at the ARBs; (2) documents provided by detainees to their AMOs; and (3) details and explanations of the decisions made to release or transfer detainees. *See* Rappaport Dec. Ex. B.

Response to Paragraph 35

This paragraph is not disputed, except that AP's initial request sought documents provided by detainees to their "personal representatives," and this request was later clarified in the parties' Stipulation and Order to refer to AMOs. Declaration of Sarah S. Normand dated February 22, 2006 ("Normand Decl."), Exh. A at Exh. B; id. Exh. B ¶ I.

36. Beginning in June 2005, DOD produced approximately 1400 pages of documents responsive to these requests. The production included redacted copies of: (1) the transcripts of 85 ARBs that had been held as of June 6, 2005; (2) correspondence between two detainees and their families that the detainees had provided to their AMOs and were presented to the ARBs; (3) Action Memos for 23 detainees that the DCO had decided to release or transfer, along with the associated ARB Records; (4) eight files of disciplinary actions that resulted from allegations of abuse by DOD personnel against detainees; and (5) 20 "Detainee Reports" of altercations between detainees from DIMS, and records concerning four allegations of threats of harm made by detainees at CSRTs. *See* Hecker Dec. ¶¶ 5-14.

Response to Paragraph 36

This paragraph is disputed as not fully supported, inaccurate and incomplete. See Hecker

Decl. ¶¶ 3-5, 8, 10, 16 & Exhs. 4-5.

37. DOD's production of documents relating to the release or transfer of any detainee was limited to documents generated out of decisions to release or transfer detainees following the ARB process; DOD produced no documents concerning detainees released or transferred from Guantanamo other than by a decision of the DCO following the completion of the ARB process. *See id.* ¶ 5f.

Response to Paragraph 37

This paragraph is not disputed, except to the extent it suggests that a final decision to transfer or release is made prior to the conclusion of the diplomatic process. See Hecker Decl. ¶¶ 3, 5, 16 & Exhs. 4-5. DOD reasonably interpreted the AP's January 18, 2005 FOIA request as limited to ARB documents. See Normand Decl., Exh. A ¶¶ 2, 13, 15 & Exhs. A-B; Normand Decl., Exh. B ¶¶ I, k; Supplemental Declaration of Sarah S. Normand dated March 13, 2006 ("Supp. Normand Decl.") ¶ 3 & Exhs. A-C; Hecker Decl. ¶¶ 3a, 5; Supp. Hecker Decl. ¶¶ 9, 12 & E-F; Declaration of Adam J. Rappaport dated March 3, 2006, Exh. F.

38. DOD is withholding detainee identifying information contained in the records of disciplinary actions arising from allegations of detainee abuse by DOD personnel, and in documents concerning detainee-against-detainee abuse. DOD asserts the right to withhold this information on the ground that is [sic] lies within the privacy provisions of Exemption 6, which permits an agency to withhold "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy," and the law enforcement provision of Exemption 7©, which permits an agency to withhold records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of privacy." *See* Hecker Dec. ¶¶ 17, 19.

Response to Paragraph 38

This paragraph is not disputed.

39. DOD is withholding detainee identifying information from the Action Memos and the ARB assessment and release or transfer decisions. DOD primarily asserts that it may withhold this information primarily under a deliberative process privilege recognized by FOIA's Exemption 5. *See* Hecker Dec. ¶ 16c.

Response to Paragraph 39

This paragraph is disputed as inaccurate and incomplete. See Hecker Decl. ¶¶ 3, 5, 16 & Exhs. 4-5.

40. DOD also claims that this information is protected under FOIA's Exemption 6. *See* Hecker Dec. at 16b.

Response to Paragraph 40

This paragraph is not disputed.

41. DOD is withholding information identifying the members of two detainees' families contained in correspondence submitted to the ARBs. DOD asserts that information identifying family members in those two cases may be withheld under the privacy provisions of Exemption 6, and purports to make the particularized showing this Court has said is required under that Exemption. *See* Hecker Dec. ¶ 15.

Response to Paragraph 41

This paragraph is disputed as incomplete. Hecker Decl. ¶ 15; Supp. Hecker Decl. ¶¶ 3-8 & Exhs. A-C.

Dated: New York, New York
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Respectfully submitted,

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